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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ARMIENTA and CARLOS ALFARO, Defendants and Appellants.	B211683 (Los Angeles County Super. Ct. No. BA338761)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lance A. Ito, Judge. Affirmed as corrected as to Joseph Armienta; and affirmed as to Carlos Alfaro.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Joseph Armienta.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Alfaro.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Armienta and Carlos Alfaro appeal from convictions for felony vandalism committed for the benefit of a criminal street gang.[1] They contend the court erred by denying their *Wheeler*/*Batson*[2] motions after the prosecutor exercised peremptory challenges against two Hispanic males, and further erred by failing to instruct sua sponte with CALJIC No. 17.00 to inform the jury that they were required to separately determine the guilt of each defendant.

Because Armienta and Alfaro's *Wheeler*/*Batson* motions failed to make a prima facie showing of discriminatory intent the trial court did not err when it denied the motions. With regard to CALJIC No. 17.00, the Attorney General concedes, and we agree, that the court erred in failing to give that instruction but we conclude that the error was harmless. The court imposed a parole revocation fine but should have imposed a probation revocation fine. Accordingly, we will order that error corrected but otherwise affirm the judgments.

BACKGROUND

Felony Vandalism

On April 6, 2008, two Los Angeles Police Department officers were patrolling in a marked patrol car. At approximately 1:00 a.m., they saw Armienta spray painting the letters "OSL" and the monikers "Sleepy" and "Chucky" with black paint on the wall of a beauty salon. The wall was approximately 50 feet long and 20 to 30 feet high and spray painting covered almost the entire wall. As Armienta finished spray painting, he looked in the officers' direction, dropped the spray can in the gutter, and got into the front passenger seat of a Yukon sports utility vehicle waiting approximately 20 feet away with its engine running.

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1 Alfaro was also convicted of unlawful possession of a firearm by a felon and of unlawful possession of ammunition. His appeal raises no issues with respect to these convictions.

2 *People v. Wheeler* (1978) 22 Cal.3d 258, *Batson v. Kentucky* (1986) 476 U.S. 79.

The officers followed the Yukon for a few blocks before stopping it. Alfaro was the driver. Armienta, still in the front passenger seat, had black paint on his fingers and thumb. The officers detained him. They searched Alfaro and his vehicle, got his identifying information, but released him.

The officers returned to the spray-painted wall and confirmed that the paint was still wet. The officers also retrieved the can of black spray paint from the gutter where Armienta dropped it.

The owner of the spray-painted building purchased more than $350.00 worth of supplies to remove the graffiti and paid a worker $300.00 to repair the wall. But before the owner began her work, the City of Los Angeles's Office of Community Beautification caused the wall to be repainted at a cost to the City of $450.00.

Search of Alfaro's Residence

On April 19, 2008, pursuant to a search warrant officers searched Alfaro's parents' house and a trailer in the backyard. In the front closet of the trailer officers found a SKS rifle with a bayonet stored in a case. The case contained an ammunition clip filled with live 7.62 caliber bullets for the rifle. In the trailer bathroom cabinet the officers found a single shot handgun and, in containers throughout the trailer, they found ammunition of various types and calibers. In the trailer they also found some of Alfaro's personal papers, including recent payroll stubs, a Department of Motor Vehicles receipt, a greeting card, and papers with Opal Street Locos gang writings. Alfaro's father told the officers Alfaro had been living in the trailer.

Inside the house, officers searched the bedroom that Alfaro and his brother Moises Alfaro once shared. Moises, however, no longer lived there. In the bedroom officers found bank statements belonging to Alfaro and several photographs of young men making gang signs relating to the Opal Street Locos gang. Armienta is depicted in one of the photographs, as is Alfaro's brother, Moises Alfaro. In the photo Moises is making an Opal Street Locos' gang sign.

During the search, Alfaro's father denied owning the firearms or any of the ammunition found in the trailer. At trial, however, the father testified that he used the trailer to store old ammunition because he used to hunt, but denied currently owning any gun. He stated that Alfaro had been the last person to live in the trailer but that Alfaro had long ago moved back into the house. Although the father admitted he had told a police officer that he made Alfaro live in the trailer after he saw Alfaro with a firearm, he claimed that he was confused when he made that statement.

Alfaro's Prior Act of Felony Vandalism

On July 24, 2005, at approximately 7:20 p.m. officers witnessed Alfaro spray painting "Opal St" and "OPL" on a brick wall. Less than five feet away from the brick wall a driver waited in a car with its engine running. When Alfaro finished spray painting he got into the waiting vehicle. The officers immediately stopped the car and detained both Alfaro and the driver. They found a spray can on the floorboard of the passenger side of the vehicle.

Gang Expert Testimony

Jose Vasquez had spent 11 of his 14 years as a police officer assigned to the gang unit of the Los Angeles Police Department Hollenbeck Division and had spent 10 of those years specifically assigned to the Opal Street Locos gang. He testified that the gang had 50 documented members. He described the gang's territory and the gang's hand sign of an "O" or an "O" with one finger extended. He testified that Opal Street Locos' gang graffiti consisted of either the words "Opal Street" or the letters "OSL" and that the "tagger" would also include his gang moniker and the moniker of the person or persons with him. By including their monikers, they were declaring to fellow members, rivals and the community alike that the "tagger" and his cohorts were still on the street and active in the gang. In Vasquez's opinion, creating gang graffiti was by definition a gang activity.

Vasquez described Opal Street Locos' primary activities as robberies, carjackings, auto thefts, narcotics sales, and felony vandalism. To prove the predicate acts of the gang

the prosecution introduced documentary evidence of felony convictions sustained in 2006 and 2007 by self-admitted member Moises Alfaro for felony vandalism and carrying a loaded firearm, and of a 2008 robbery conviction of Opal Street Locos gang member Jose Zazueta.

Before the April 2008 incident Armienta had told Vasquez that his moniker was "Sleepy" and thereafter Vasquez saw on Armienta's forearm a tattoo of an "O" with the Roman numeral XV inside the "O." The "XV" signified that the Opal Street Locos gang did not pay "taxes" to the Mexican Mafia prison gang. In Vasquez's opinion, Armienta was an active member of the Opal Street Locos gang as was Alfaro, who used the monikers "Lil' Slick" or "Chucky," although he had no gang related tattoos.

In response to a hypothetical question, Vasquez opined that the act of spray painting the gang's letters "OSL" and the monikers "Sleepy" and "Chucky" was intended to benefit the Opal Street Locos gang. He further opined that the person waiting in the car acted in concert with the person painting the graffiti by acting as a lookout and getaway driver.

Defense

Neither Armienta nor Alfaro presented a defense.

Verdicts

The jury convicted Armienta of felony vandalism (Pen. Code, § 594, subd. (a), count 1)[3] and found that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)).

The jury likewise convicted Alfaro of felony vandalism (§ 594, subd. (a), count 2) and found that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). The jury also convicted Alfaro of unlawful possession of a firearm by a felon (§ 12021, subd. (a)(1), count 4)[4] and of unlawful possession of

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3 Further unmarked statutory references are to this Code.

4 The parties stipulated that Alfaro had been convicted of a felony.

ammunition (§ 12316, subd. (b)(1), count 5). In a bifurcated proceeding, Alfaro admitted that he had served a prison term. (§ 667.5, subd. (b).)

The court imposed and suspended a six year prison term and placed Armienta on five years' formal probation on various conditions, including that he serve one year in county jail and pay related fines and fees.

The court sentenced Alfaro to an aggregate term of five years and eight months in state prison and imposed related fines and fees.

Armienta and Alfaro appeal from the judgment.

DISCUSSION

Wheeler/Batson Motions[5]

Armienta and Alfaro are both Hispanic and they contend the prosecutor's preemptory challenges against the only two seated prospective Hispanic jurors demonstrated the prosecutor's group bias against Hispanics and thus the trial court erred by finding that they had not presented a prima facie showing of discriminatory intent and by denying their *Wheeler*/*Batson* motions. We disagree.

"It is well settled that '[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. ([*People* v.] *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277; see *People v. Griffin* (2004) 33 Cal.4th 536, 553.) Such a practice also violates the defendant's right to equal protection under the Fourteenth Amendment to the United States Constitution. (*Batson* [*v. Kentucky*], *supra*, 476 U.S. at p. 88; see also *People v. Cleveland* (2004) 32 Cal.4th 704, 732.)' (*People v. Avila* (2006) 38 Cal.4th 491, 541.)

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5 Alfaro and Armienta join in each other's arguments.

"The United States Supreme Court recently reaffirmed the procedure and standard to be used by trial courts when *Batson* motions challenging peremptory strikes are made. '"'"'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.'" [Citation.]' (*Snyder v. Louisiana* (2008) 552 U.S. ___, ___, [170 L.Ed.2d 175, 128, S.Ct. 1203, 1207].)" (*People v. Hamilton* (2009) 45 Cal.4th 863, 898.)

Armienta and Alfaro contend the prosecutor's peremptory challenges to Juror 4 (#0858) and Juror 5 (#6204) demonstrated the prosecutor's group bias against Hispanics.

Prospective Juror 4 (#0858) was single and lived in Lincoln Heights with his parents, whose car had once been stolen. He was a full-time student studying kinesiology and physical education who wanted to minor in criminal justice. When the court asked about his reaction to the charges, he responded that he lived in a gang-infested neighborhood where "those type of crimes happen all the time." He had some friends in law enforcement, had shot guns on a firing range, believed that gun laws were fair, and that the Los Angeles Police Department was doing "a great job." In his free time he liked to exercise, play soccer and baseball, and described himself as fair, serious, and hard working.

Juror 4 offered that he would have difficulty being impartial because some of his family members were gang members and he would view the defendants as his own family. Although at first he stated that even if the prosecutor presented evidence to prove every element of the crimes beyond a reasonable doubt he still might not be able to vote guilty, he later stated that he might be able to put his bias aside.

Juror 5 (#6204) lived in the "mid-city," was a student at Los Angeles City College studying radiology technology, and his car stereo had once been stolen. He had no experience with guns and was unfamiliar with California's gun laws. He believed that

the Los Angeles Police Department was "strict" but "fair." In his free time he worked in UCLA's dining hall cafeteria, slept, played video games, and went to movies. He described himself as "laid back[,] . . . hard working[,]" and "open minded."

Juror 5 said he had no personal experience with gangs although there were gangs in his neighborhood but they did not bother him. He admitted, however, that some of his family had been gang members but said they were "too old now" and had children. He later explained that the gang members he had referred to were a cousin and an older brother but that "they're just family guys now."

He saw a lot of graffiti in the neighborhood but he did not hear any of his friends or family members talking about it. He had never reported graffiti to the city or police because it was "not [his] building." He was so used to seeing graffiti in his neighborhood that he usually just walked by it.

The prosecutor exercised her first peremptory challenge against Juror 4 and her third peremptory challenge against Juror 5. After the challenge to Juror 5, Armienta and Alfaro made a *Wheeler*/*Batson* motion on the ground that the prosecutor's challenge to the only two seated Hispanic males showed group bias. he court made "a specific finding that there is no prima facie case made," but asked the prosecutor to provide an explanation "so the record is complete."

With respect to Juror 4, the prosecutor stated that he lived in a gang-infested neighborhood, had family members who were gang members, and indicated that because of those ties, he might hesitate to vote for guilt even if convinced beyond a reasonable doubt of Armienta and Alfaro's guilt. With respect to Juror 5, the prosecutor noted that the juror's older brother and a cousin were gang members. The prosecutor also noted that Juror 5 "specifically said that he's seen graffiti in the neighborhood [and] fail[ed] to report it because it's none of his business and it's just not something he wants to do."

The court denied the *Wheeler*/*Batson* motions, "finding that there was not a prima facie case made because of the specific voir dire that was given, and that the exercise of the peremptory challenge by the prosecutor, under these circumstances, was—the

reasoning for that is pretty apparent just on its surface." The court also noted, that if it was wrong in finding no prima facie showing, then it "also accept[ed] the prosecutor's explanation . . . as being rational and not racist."

"In the first stage of an inquiry under *Batson*/*Wheeler*, the burden rests on the defendant to '"show[] that the totality of the relevant facts gives rise to an inference of discriminatory purpose."' (*Johnson v. California* (2005) 545 U.S. 162, 168; . . .)" (*People v. Hamilton*, *supra*, 45 Cal.4th at pp. 898-899.) When a trial court denies a *Wheeler*/*Batson* motion on the ground that the defendant failed to establish a prima face case of purposeful discrimination, we review the record on appeal to determine whether there is substantial evidence to support the ruling. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

Substantial evidence supports the court's finding that the challenges to these two prospective jurors did not raise the requisite inference of discriminatory purpose to state a prima facie case of group bias against Hispanics. The two jurors harbored either actual or potential bias against the prosecution because of their familial connections to gang members. Juror 4 had family members who were gang members and openly admitted that for this reason he was biased in favor of gang members and could not be impartial in assessing gang members' guilt. Juror 5 had family members who had formerly been gang members but who were apparently no longer active in the gang. Both prospective jurors' familial connections presented the likelihood of bias in favor of gang members and against the prosecution's case. In addition, Juror 5's comments suggested that he did not consider graffiti a serious matter, trivializing the key part of the prosecution's case.

The trial court correctly rejected Armienta and Alfaro's argument that the challenges to the only two seated Hispanic males was sufficient to raise an inference of discriminatory intent for purposes of showing a prima facie case of group bias. (See *People v. Hamilton*, *supra*, 45 Cal.4th at p. 899 [trial court correctly rejected the argument that the challenge of the only Black prospective juror was sufficient standing alone to state a prima facie case of discriminatory intent].) Moreover, the prosecutor

presented, the trial court believed, and we agree that race neutral reasons existed for the prosecutor's challenges to Jurors 4 and 5.

Instructional Error

Armienta and Alfaro contend the trial court erred by failing to instruct the jury sua sponte with CALJIC No. 17.00 regarding their duty to decide the guilt of each defendant separately. The Attorney General concedes the error and we agree.

CALJIC No. 17.00 directs the jury: "You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to [both] . . . the defendants, but do agree upon a verdict as to any one [or more] of them, you must render a verdict as to the one [or more] as to whom you agree."

A trial court has a sua sponte duty to give this instruction when two or more defendants are jointly tried in the same prosecution. (See *People v. Mask* (1986) 188 Cal.App.3d 450, 457 ["It is fundamental that when more than one defendant is prosecuted in an action, the jury must consider separately the guilt or innocence of each defendant. . . . The instruction should have been given even absent a request."]; see also §§ 970, 1160 [concerning separate possible verdicts for multiple defendants or charges].) Error in failing to do so is subject to harmless error review. (*People v. Mask*, *supra*, 188 Cal.App.3d at p. 457 [error in failing to give the instruction sua sponte was harmless under both *People v. Watson* (1956) 46 Cal.2d 818, 836 and *Chapman v. California* (1967) 386 U.S. 18].)

Although it was error to fail to instruct with CALJIC No. 17.00, the error was harmless under both the *Watson* and *Chapman* standards. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman v. California*, *supra*, 386 U.S. 18.)

Overwhelming evidence supported every element required to show that Armienta was guilty of felony vandalism. Armienta, however, contends that his defense was adversely affected by evidence of his association with Alfaro, against whom multiple charges had been filed, and by the evidence that Alfaro had in 2005 committed an act of felony vandalism involving gang graffiti. We disagree. Arresting officers witnessed

Armienta defacing someone else's real property. (§ 594, subd. (a).) The only other element necessary to prove felony vandalism was the cost to remove the graffiti and the unrefuted evidence established that the vandalism cost more to remove than the $400 required to make the crime a felony. (§ 594, subd. (b).)

Likewise, the evidence of Alfaro's guilt of felony vandalism, although perhaps not as strong as the evidence against Armienta nonetheless was also overwhelming. Officers observed a driver in a vehicle only 20 feet away from where Armienta was spray painting the wall with gang graffiti. The engine was running and they watched Armienta get into the passenger side and then saw the vehicle drive away. They followed and stopped the vehicle after it had traveled only a few blocks. Alfaro was the driver. Shortly after the stop they returned to the site of the vandalism and verified that the paint was still wet.

Alfaro, however, contends that the evidence against him of vandalism was not "inescapably formidable" nor that an innocent explanation for his being in the area was "implausible on its face." He points out that he was not himself applying the spray paint, was parked next to the center divider at an intersection rather than the curb closest to the building, and officers did not arrest him on the night of the incident. As to his moniker being on the graffiti, he argues that although "Chucky" had at one time been his moniker, per Vasquez a gang member might have more than one moniker, and when Armienta spray painted "Sleepy" and "Chucky," he was using his own two monikers and not identifying Alfaro. We disagree.

Alfaro was out on the street at 1:00 a.m., a time when businesses are closed, waiting in his vehicle, only 20 feet away from the actual "tagger," with the vehicle's engine running. Further, he and Armienta were members of the same gang. Armienta spray painted Alfaro's moniker of "Chucky" on the wall together with his own moniker "Sleepy," which the gang expert explained meant that they had collaborated on the tagging. No evidence suggested that "Chucky" was Armienta's gang moniker or why he would use more than one of his monikers to sign the graffiti. In addition, the evidence showed that Alfaro had previously committed felony vandalism in 2005 and there, as

here, a driver waited in a vehicle with its engine running. After spray painting gang graffiti, Alfaro escaped in the waiting vehicle. Thus, the evidence against Alfaro was "inescapably formidable" and an innocent explanation for his being in the area was "implausible on its face."

Alfaro further contends that the evidence supporting the gang enhancement was weak because evidence indicated that he was no longer an "active gang member." He points to the gang expert's testimony that the last time he saw Alfaro, Alfaro was employed, doing well, and was not then engaged in any gang activity. Accordingly, Alfaro contends the failure to give the omitted instruction was independently prejudicial with respect to the gang enhancement. We again disagree.

Even assuming for sake of argument that "active gang membership" is an essential element of the gang enhancement, Alfaro's purposeful acts in helping Armienta spray paint gang graffiti shows that he was still an active member of the Opal Street Locos gang. Moreover, the gang expert testified that the act of spray painting gang graffiti was by definition a gang related activity.

Beyond the overwhelming evidence of their guilt, the instructions that the court did give effectively informed the jury that they were required to decide Armienta and Alfaro's guilt individually thus rendering the error harmless for this reason also. When the prosecution offered evidence to prove the additional charges against Alfaro, the court provided limiting instructions to inform the jury that the evidence was being offered as against Alfaro only and could not be considered with respect to Armienta. At the close of trial the court again instructed that certain evidence had been admitted against one of the defendants and had not been admitted against the other defendant and reminded the jury that they could not consider that evidence as against the other defendant.

The court instructed on the elements of the charged offenses and the elements of the lesser included offenses and stated that each element was required to be proved beyond a reasonable doubt in order to return a guilty verdict. Each of these instructions referred by name to either Armienta or Alfaro, or specified when a particular instruction

applied to both. In explaining the prosecution's burden of proving each element of the crime beyond a reasonable doubt, the court instructed the jury with CALJIC No. 2.90 directing that "a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the people the burden of proving him guilty beyond a reasonable doubt."

The court also instructed with CALJIC No. 17.02 which informed the jury that "each count charges a distinct crime. You must decide each count separately. The defendant Carlos Alfaro may be found guilty or not guilty of any or all of the crimes charged in counts 2, 4 and 5. Your finding as to each count must be stated in a separate verdict." The court provided the jury separate verdict forms for Armienta and Alfaro and for each charge.

In her closing argument, the prosecutor discussed the charges against Armienta and Alfaro separately and explained how the evidence presented at trial related to each separate count. Likewise in closing arguments, defense counsel focused on the charges and evidence as they related to their respective client.

Given the overwhelming evidence of their guilt of felony vandalism for spray painting gang related graffiti, and the overall effect of the court's instructions relating the charges and evidence to each defendant individually (which concept was reinforced by counsels' closing arguments), it is not reasonably probable that Armienta and Alfaro would have achieved a more favorable result had the court instructed with CALJIC No. 17.00. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) For these same reasons, we conclude that the error was also harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

Armienta's Probation Revocation Fine

The court imposed and suspended a six-year prison term and placed Armienta on five years' formal probation on various conditions, including that he serve one year in county jail and pay related fines and fees. Among others, the court imposed a $1,000

restitution fine pursuant to section 1202.4, subdivision (b) and imposed and stayed a *parole* revocation fine pursuant to section 1202.45.

The Attorney General contends, and we agree, that because the court granted Armienta probation it should have instead imposed and stayed a *probation* revocation restitution fine pursuant to section 1202.44, with the stay to become permanent upon successful completion of probation.[6]

DISPOSITION

With respect to Carlos Alfaro, the judgment is affirmed. As to Joseph Armienta, the judgment is corrected to reflect imposition of a probation, rather than a parole, revocation restitution fine pursuant to section 1202.44. The court is directed to prepare a new abstract of judgment reflecting this change. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.

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6 Section 1202.44 provides: "In every case in which a person is convicted of a crime and a conditional sentence or a sentence that includes a period of probation is imposed, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional probation revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional probation revocation restitution fine shall become effective upon the revocation of probation or of a conditional sentence, and shall not be waived or reduced by the court, absent compelling and extraordinary reasons stated on the record. . . ."